IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 643

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A NEBRASKA CORPORATION,
Petitioner,

vs.

ANTONIA P. MICCOLIS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinion of the Court Below.

The opinion of the Circuit Court of Appeals was written by Circuit Judge Evan A. Evans. It was filed on October 28, 1940, and appears on page 232 of the record. It has not as yet been published in any of the official reports.

Jurisdiction.

Under Sec. 240 (a) U. S. C. A. 347, this court has jurisdiction to grant the writ of certiorari in a proper case.

Statement of the Case.

The statement of the case contained in the petition under the heading, "Matters Involved," is substantially correct except in so far as said statement says:

> "Whereas he was active as a member of a ring engaged in illicit liquor traffic, in which his sales of sugar and yeast for a given period amounted to more than ten times the legitimate sales of his grocery store. He was prosecuted by the United States and by the State of Indiana, and convicted and punished for conspiracy and other violations of the National Prohibition Laws. These defenses were proved without dispute."

The respondent says that there was no evidence that he was a member of a ring engaged in illicit liquor traffic; there was evidence that he sold considerable sugar and yeast to manufacturers of illicit liquor; that ten years before his application for insurance he had been indicted and convicted for conspiracy to violate the National Prohibition Act and was given a sentence of four months imprisonment; that in 1933 after the policy in this case was issued and in force, he was indicted, plead *nolle contendere* and was fined. There were no other convictions of the National Prohibition Laws.

Respondent also says that there was no evidence that the petitioner retendered premiums upon discovery of the falsity of the statements in the application. There is some evidence, which, if believed, indicates that a check was offered to respondent as a tender back of premiums, or in settlement of the policy, but respondent says that this is not a tender under the Indiana law.

In other particulars the statement of the matters involved is substantially correct.

Questions Presented.

I.

The questions presented are substantially such as were presented to the Circuit Court of Appeals with the exception of the first question which entirely omitted the proposition that petitioner's policy was issued on the assessment plan and that the statute was inapplicable to insurance issued on the assessment plan. Petitioner's proposition of law relied on in the Circuit Court of Appeals as contained in its brief in presenting that question to the Circuit Court of Appeals is as follows:

> "A. To meet plaintiff's contention that this is a life insurance policy:
>
> "1. The policy was not a life policy with disability benefits attached thereto, but a policy of accident insurance covering both disability and death by accident. The only point in common between this policy and a life policy is that the latter covers death at all events, while the former covers accidental deaths only, as well as disability caused by accident.
>
> *United Commercial Travelers* v. *Edwards*, 10 C. C. A., 51 Fed. (2d) 187.
>
> *Jones* v. *Prudential Ins. Co.*, (Mo. Sup.) 263 S. W. 429.
>
> *Standard Life & Acc. Ins. Co.* v. *Carroll*, 3 C. C. A., 86 Fed. 567.
>
> *Mutual Reserve Life* v. *Dobler*, 9 C. C. A., 137 Fed. 550.
>
> *Fidelity & Casualty Co. of N. Y.* v. *Dorough*, 5 C. C. A., 107 Fed. 389.
>
> *Baumann* v. *Preferred Acc. Ins. Co.*, 225 N. Y. 480; 122 N. E. 628.
>
> *Arneberg* v. *Continental Cas. Co.*, 178 Wisc. 428; 190 N. W. 97; 29 A. L. R. 93.

Metropolitan Life Ins. Co. v. *Hardison,* (Mass.) 94 N. E. 477.

Flannagan v. *Provident Life Ins. Co.,* 4 C. C. A., 22 Fed. (2) 136-140.

"2. The Indiana statutes in force when this policy was issued provided for the licensing of foreign life insurance companies (Burns R. S. 1933, Sec. 39-236). They also provided for the licensing of a foreign assessment association doing life *or* accident business (Burns R. S. 1933, Sec. 39-415).

"3. The life insurance statute requires many provisions in a life policy which are obviously not applicable to accident policies, such as extended insurance, cash or paid-up values, grace period, a clause making policies incontestable after two years, etc. (Burns R. S. 1933, Sec. 39-801). The decisions recognize the difference between life insurance policies as such and a policy of accident insurance.

United Commercial Travelers v. *Edwards,* 10 C. C. A., 51 Fed. (2) 187-190.

"4. The three-year limitation provision of Burns R. S. 1933, Sec. 39-1713, applies to all foreign companies, whether life, accident, casualty, fire, plate glass, or whatever; hence, reference to it in the policy in question is no indication of a concession that it is a policy of life insurance."

Respondent believes that petitioner intentionally did not present this question to the Circuit Court of Appeals because it was relying on a line of decisions by the Supreme Court of Indiana, to-wit: *Metropolitan Life Ins. Co.* v. *Becraft,* (1938) 213 Ind. 378, 383; *Rushville National Bank, Trustee,* v. *State Life Ins. Co.* (1936) 210 Ind. 492, 505; *New York Life Ins. Co.* v. *Kulenschmidt,* 213 Ind. 212, 220; and *Metropolitan Life Ins. Co.* v. *Alterovitz,* 214 Ind. 186; 14 N. E. (2d) 570, based upon Burns Ann. Stat. 1933, sec. 39-801, #3; where in the Indiana Supreme Court overruled a long line of decisions based upon that part of the statute which provides:

"The policy, together with the application therefor,

> a copy of which application shall be attached to the policy and made a part thereof, shall constitute the entire contract between the parties." (See especially, *Metropolitan Life Ins. Co.* v. *Alterovitz*, 214 Ind. 186.)

The balance of the section which is relied on by the respondent provides:

> "and shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for non-payment of premiums. * * *" (See Petitioner's Brief, pg. 33, subd. 3.)

II.

Under petitioner's second question presented, respondent contends that the tendered instruction was incorrect because it failed to take into consideration the waiver of petitioner of its right to claim a forfeiture of the policy and its assumption that the facts had been proven beyond dispute, establishing the right to claim a forfeiture or cancellation. The instruction also assumes that the tender of a draft is a tender of the return of premiums which is in direct conflict with the Indiana decisions.

Summary of Argument.

A.

The proposition of law attempted to be presented by the petitioner to this court was not presented to the Circuit Court of Appeals and, therefore, cannot form the basis for petition for writ of certiorari to this court.

B.

Petitioner's Point B is no longer available since the decision of this court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 overruling *Swift* v. *Tyson*, 16 Peters 1, 10 L. Ed. 865.

C.

Petitioner's tendered instruction to the trial court was wrong in that it omitted certain elements necessary for a directed verdict and assumed the proof of facts in dispute whereas the instruction as modified by the court stated the law much more favorably to petitioner than petitioner was entitled to.

ARGUMENT.

A.

The Circuit Court of Appeals Did Not Decide a Question of Local Law in Such a Way as to Probably Contravene a Local Decision or a Decision of This Court.

Respondent contends that the Circuit Court of Appeals did not erroneously decide a question of local law which contravened a local decision for the reason that such question was never presented to the Circuit Court of Appeals.

Petitioner for the purpose of taking advantage of the statute of Indiana, Burns 1933, Sec. 39-801 (3) presented to the Circuit Court of Appeals only one question and that was whether the policy sued upon was a life insurance policy or an accident insurance policy. For the purpose of indicating what question was presented to the Circuit Court of Appeals, we have set out that part of petitioner's brief in the Circuit Court of Appeals dealing with that question. We believe that this was done by the petitioner for the purpose of taking advantage of the first part of Burns 1933, Sec. 39-801 (3) which provided:

> "That the policy, together with the application therefor, a copy of which application shall be attached to the policy and made a part thereof, shall constitute the entire contract between the parties."

Under that provision of the statute the Supreme Court of Indiana overruled a long line of decisions which held that the answers to questions in an application for insurance need only be substantially true, and that the policy cannot be avoided if the applicant had made correct answers to the agent taking the application. In *Metropolitan Life Ins. Co.* v. *Alterovitz,* 214 Ind. 186; 14 N. E. (2d) 570, the Su-

preme Court of Indiana in holding that a policy may be avoided on account of incorrect answers in the application based its opinion on the statute in saying:

> "After the enactment of that statute, the case of *Sternaman* v. *Metropolitan Life Ins. Co.*, 170 N. Y. 13; 62 N. E. 763; 57 L. R. A. 318, and others to the same effect, ceased to be authority upon the question in an action upon a life insurance policy issued by a 'life insurance corporation doing business within the state,' when a copy of the application was indorsed upon or attached to the policy. The statutory rule superseded the court-made rule."

The court further said:

> "We are mindful of the fact that there are opinions of this court long prior to the adoption of the law of 1909 which seem to be contrary to this opinion. We refer especially to cases of *Michigan Mutual Life Insurance Co.* v. *Leon*, 138 Ind. 636, 37 N. E. 584, and *Germania Life Insurance Co. of New York*, v. *Lukenheimer*, 127 Ind. 536, 26 N. E. 1082. Conceding the law announced in these opinions, and others of this court of like import, were correct in principle, they are no longer controlling in view of the act of 1909, *supra*."

It will thus be seen that the Supreme Court of Indiana based its opinion upon the statute and it is respondent's belief that the petitioner attempted to take advantage of that part of the statute and for that reason made no contention in the Circuit Court of Appeals that the petitioning company was an assessment company. It based its entire reliance upon the proposition that the contract of insurance was a contract of accident insurance and consequently the statute did not apply.

On the question submitted to the Circuit Court of Appeals the respondent contends that the law is as stated in *Guardian Life Ins. Co. of America* v. *Barry*, 213 Ind. 56; 10 N. E. (2d) 614; and in *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489. The policy in the *Guardian Life Ins. Co. of America* v. *Barry* was a policy insuring the life of the insured against death in all events and containing also disability benefits.

The insured suffered a disability and sought to recover. The company answered that the insured had obtained the policy through fraudulent representations. The insured replied that the policy had become incontestable in that it had been in effect for more than two years. The Supreme Court held that:

> "In all of the cases which have come to our attention, dealing with statutes of the character here involved (incontestability statutes) it has been held that a combination of life and disability policies is to be regarded as two distinct contracts, though contained in one instrument, and that statutory provisions for an incontestability clause for life insurance policies is inapplicable to the disability insurance."

The court also says in this case:

> "But there are other statutes authorizing the organization of insurance companies. Burns' Ann. St. 1933, Sec. 39-101 *et seq.*, authorizes the organization of companies to issue policies of insurance upon 'vessels, freight, money, goods and effects, on the life or health of any person' (Burns' Ann. St. 1933, Sec. 39-120), and against loss by fire, *et cetera.* It would seem that it was the legislative intention to deal with all policies of life insurance rather than with the policies of life insurance companies organized under the particular statute. * * * It is therefore but reasonable to conclude that public interest was thought to require that policies upon the life of persons should be protected, and that no necessity was seen for a like protection in the case of policies insuring against disability. The insurance contract in question is severable, and, while it insures the life of appellee, it insures him against permanent disability for a separate and distinct consideration."

And in a case decided by this court, *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, this court held that in a policy of insurance which was issued to one James Whitfield and which provided indemnities in case of certain injuries and further provided:

> "If death results solely from such injuries within ninety days, the said Company will pay the principal sum of five thousand dollars to (the beneficiary) if living; and to (the personal representative) if dead."

The insured died as the result of:

> "bodily injuries, effected through external, violent, and accidental means, and by a pistol shot."

This court after considering the case fully held that the policy was a life insurance policy which under the Missouri statute excluded the defense of suicide. In other words, that the policy could not be contested for suicide. We believe, therefore, that the opinion of the Circuit Court of Appeals is not contravened by any local decision in the State of Indiana, but is supported by local decisions and by the decisions of this court. We might say in passing that the only case relied on by petitioner, to-wit: *Western Life Indem. Co.* v. *Bartlett*, 84 Ind. App. 589, was not presented to the Circuit Court of Appeals in petitioner's brief on appeal or in petitioner's reply brief. Neither was any mention made of Acts of 1937, Burns' Rev. Stat. 1933, old vol. 8, Sec. 39-430, upon both of which petitioner relies in its petition herein, and respondent believes that a question which was not presented to the Circuit Court of Appeals on appeal cannot form the basis of petition for writ of certiorari; the petitioner cannot take advantage of invited error.

B.

Whether or Not the Decision of the Circuit Court of Appeals Construed the Indiana Statute Differently Than Similar Statutes Were Construed by Other Circuit Courts of Appeals Is Immaterial.

We do not believe that Point B has any further significance in view of the decided cases by the Supreme Court of the State of Indiana, and the decision of this court in *Tompkins* v. *Erie Railroad* overruling *Swift* v. *Tyson* and other cases of like import. The fact that other Circuit Courts of Appeals may have construed similar cases differently than the Circuit Court of Appeals construed the

statute in the instant case, is without force when the decision of the Circuit Court of Appeals is in line with the decisions of the Supreme Court of Indiana, and this court.

C.

The Instruction as Given by the District Court Is More Favorable to Petitioner Than It Was Entitled to and Consequently Cannot Form the Basis for a Writ of Certiorari.

In regard to Point C, the respondent says that the correctness of answers in an application for insurance may be waived and they are waived by the failure of the insurer to take steps to avoid the policy upon learning of the incorrectness of the answers. These steps include: (1) Action by the company to avoid the policy; (2) Notice to the insured, if living, and to the beneficiary, if dead; (3) A tender back of the premiums paid. *Commercial Life Ins. Co.* v. *Schroyer,* 176 Ind. 654; 95 N. E. 1004. We also believe that when the question of the materiality of the answers is submitted to the jury upon proper instructions, that the jury determines and is required to determine whether the representations are of such a character as to materially affect the risk. In *New York Life Ins. Co.* v. *Skinner,* 214 Ind. 384; 14 N. E. (2d) 566, the Supreme Court of Indiana said:

> "Appellant's instructions * * * tendered and refused, are all open to the same objections. Each of them undertook to advise the jury that, if they found that certain representations made by the insured in his application were untrue, then such representations were 'material to the risk.' These instructions were improper as invading the province of the jury. It was for the jury to say whether, under all the circumstances, the representations were of such a character as to materially affect the risk assumed by the appellant when it issued the policy of insurance sued on. There was no error in refusing these instructions."

This case was decided in 1938 and on the day following the case of *Metropolitan Life Ins. Co.* v. *Alterovitz,* and consequently is the last word of the Supreme Court of Indiana on this proposition. Consequently even though the statement in the application for insurance may have been incorrect, it is for the jury to say whether the representations were such as to materially affect the risk.

On the question of tender, respondent's position is that this was decided by the jury against the petitioner and while it is true that the court did not give the instruction to the jury as the petitioner tendered it, the instruction as modified by the court nevertheless states the law more favorable than the petitioner was entitled to have it stated. The jury had a right to find whether the actions of the insurer were such that they waived the correctness of the answers in the application for insurance, and whether the answers, if incorrect, materially affected the risk. They had a right to determine whether insured's conviction ten years prior to his application for insurance in which he received a sentence of four months' imprisonment was of such a nature as to materially affect a risk. They had a right to determine whether his sale of sugar and yeast to persons engaged in the illicit liquor traffic was of such a character as to materially affect the risk. They also had a right to determine whether or not a tender had been made, the evidence on this being conflicting. Under such circumstances the instruction given by the court was not harmful to the petitioner; in fact, it was more favorable than the petitioner had a right to expect. According to the decisions in Indiana, the tender of a check is not legal tender and consequently does not amount to a tender back of premium *United States Ins. Co.* v. *Clark,* 41 Ind. App. 345, 83 N. E. 760; *State Life Ins. Co.* v. *Pletcher,* 78 Ind. App. 128, 134 N. E. 876; and furthermore, the person to whom the money is tendered need not make any specific objections to either the

nature, medium or amount of the tender. *Sofnas* v. *John Hancock Life Ins. Co.*, ... Ind. App. ....., 21 N. E. (2d) 425. This last case was decided in 1939 so that the instruction as given by the court is much more favorable to petitioner than the petitioner had a right to expect.

Since the petition does not present a case in which the opinion of the Circuit Court of Appeals has decided an important question of local law a way probably conflicting with the local decisions, but that the decision on the question presented to it is in conformity with the decisions of the Supreme Court of Indiana, and of this court, and since the instruction given by the trial court; which the Circuit Court of Appeals did not pass upon in view of its decision upon the other question; respondent contends that the petition does not present any question which should be considered by this court on a writ of certiorari. Respondent, therefore, respectfully submits that the petition for writ of certiorari be denied and that the judgment of the Circuit Court of Appeals of the Seventh Judicial Circuit be in all things affirmed.

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